# Congress of the United States
## Washington, DC 20515

November 5, 2021

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Martin J. Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Kiran Ahuja
Director
U.S. Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Dear Secretary Becerra, Secretary Walsh, Secretary Yellen, and Director Ahuja:

We write to express deep concern with the departments of Health and Human Services, Labor, Treasury, and the Office of Personnel Management's Interim Final Rule (IFR) entitled "Requirements Related to Surprise Billing; Part II," published as required by the No Surprises Act, which was included in the Consolidated Appropriations Act, 2021 (P.L. 116-260).

We are Members of Congress with health care expertise, and we worked intimately in a bipartisan fashion with our Congressional colleagues to pass legislation into law with the express purpose of protecting patients from surprise medical bills. This IFR, which establishes the Independent Dispute Resolution (IDR) process, does not reflect legislation that could have passed Congress or the law as written. As your agencies disregarded both the letter and the spirit of the law in issuing this IFR, immediate revisions are necessary to ensure the final implementing regulation upholds our clear statutory language and intention.

The No Surprises Act was the result of two years of bipartisan, bicameral deliberations and negotiation on solutions to protect patients from surprise medical billing and create a balanced process for providers and payors to settle payment disputes. Multiple proposals for resolving this issue were considered, including a benchmark rate, an IDR process, and a blend of both. **As a result of this careful deliberation and negotiation, the final law explicitly required an independent entity to consider a broad range of criteria and weigh all relevant factors equally when deciding appropriate payments for out-of-network services.**

To keep patients out of the middle of these payment disputes, Congress established a mechanism to determine patient cost-sharing. The first IFR issued by the Administration outlined the requirements for determining the qualifying payment amount (QPA) — typically the median in-network rate — which determines patient cost-sharing. While we appreciate that the formula for determining the QPA will help keep patient costs to a minimum, we recognize that it is unlikely to reflect actual market-based payment rates for all circumstances.

Separately, the IDR process established under the law explicitly states providers and payors can bring any relevant information to the IDR process aside from billed charges and public payor information. In addition, the statute clearly states that the IDR entity "**shall consider**" the QPA; level of training; experience; quality and outcomes measurements; market share of parties; patient acuity or complexity of services; teaching status, case mix, and scope of services in the event that the provider is a facility; demonstrations of previous good faith efforts to negotiate in-network rates; and prior contract history between the two parties over the previous four years.

Unfortunately, the IFR as written not only deviates from the letter of the law but also fails to recognize the critical context of how Congress ultimately reached this deliberate bipartisan, bicameral compromise after months of negotiation. We were dismayed to learn that the IFR has eschewed the letter of the law by requiring IDR entities to begin the arbitration process with the presumption that the QPA is the appropriate out-of-network amount, circumventing the congressionally-required consideration of all relevant factors when determining the payment amount, not just a single data point.

Over the last several years, the medical professionals in Congress received copious expert input from providers and physician groups. They repeatedly cited the importance of ensuring a balanced IDR process in determining a payment rate in order to prevent adverse outcomes such as artificially-low payment rates, the narrowing of provider networks, and reduced patient access. While the QPA was originally intended to be applied as a baseline consideration among other factors during the arbitration process, the Administration's proposed rule places a disproportionate emphasis on the QPA, which necessarily undervalues other factors brought to the arbiter, including quality and outcomes data.

The medical professionals in Congress met with the Centers for Medicare and Medicaid Services in June to learn about agency priority interpretations during the rulemaking process, as well as the anticipated impact on American patients. During this conversation, we specifically reminded your Administration the letter of the law requires implementation of a fair and balanced process to settle disputes between health plans and providers. We also highlighted the legislative intent by explaining the different policies Congress explored to address surprise medical billing and the solution Congress ultimately passed into law.

By instructing the IDR entity to rely upon the QPA as the primary factor in determining payment rates, the IFR will limit providers' ability to utilize other statutorily required and relevant factors when negotiating with the payor. Under this IFR, we are concerned that this IDR process will lead to narrower networks and decreased access to medical care for millions of American patients, which would have a disproportionate impact on access to care in rural and underserved areas. If this IFR is finalized as written, providers may no longer be able to afford to serve these communities given the downward pressure on commercial rates coupled with the already delicate payor mix.

As Members of Congress and health care professionals, we strongly encourage your Administration to revise the proposed IFR to align with the statute and congressional intent to protect patients from these negative outcomes. We also request timely implementation of the other patient protections included in the No Surprises Act, like the advanced estimate of benefits and crackdown on inaccurate provider directories. The medical professionals in Congress stand ready to collaborate with your offices to ensure implementation meets statutory requirements before regulations take effect on January 1, 2022.

Sincerely,

Michael C. Burgess, M.D.
Member of Congress

Andy Harris, M.D.
Member of Congress

Brad Wenstrup, D.P.M.
Member of Congress

Bill Cassidy, M.D.
United States Senator

Roger Marshall, M.D.
United States Senator

Brian Babin, D.D.S.
Member of Congress

Larry Bucshon, M.D.
Member of Congress

Earl L. "Buddy" Carter, R.Ph.
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Gregory F. Murphy, M.D.
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Ronny L. Jackson, M.D.
Member of Congress

Jefferson Van Drew, D.M.D.
Member of Congress

cc: Daniel J. Barry, Acting General Counsel, U.S. Department of Health and Human Services; Peter J. Constantine, Solicitor, U.S. Department of Labor Associate; Laurie Schaffer, Principal Deputy General Counsel, U.S. Department of the Treasury; Lynn D. Eisenberg, General Counsel, U.S. Office of Personnel Management